IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 67 of 2006
In
COMPANY APPLICATION No. 216 of 2006
With
COMPANY PETITION No. 68 of 2006
In
COMPANY APPLICATION No. 220 of 2006
With
COMPANY PETITION No. 69 of 2006
In
COMPANY APPLICATION No. 221 of 2006
With
COMPANY PETITION No. 70 of 2006
In
COMPANY APPLICATION No. 222 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE ANANT S.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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TORRENT POWER AEC LTD. - Petitioner(s)
Versus
... - Respondent(s)

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Appearance :

MR S.N.SOPARKAR, Ld.Senior Counsel appearing with Mrs. SWATI SOPARKAR for Petitioner(s) : 1,
MR SUNIL L MEHTA for Respondent(s) : 1,
MR PURVISH J MALKAN for Respondent(s) : 1,
MR.VARUN K.PATEL for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANANT S.DAVE

Date : 12/07/2006

ORAL JUDGMENT

1. All these petitions are filed for sanction of the Scheme of arrangement under Sections 100, 101 and 391 to 394 of the Companies Act, 1956. The Company Petition No. 67 of 2006 is for a Scheme of Arrangement including Amalgamation to be made between Torrent Power AEC Limited (TAPL) (hereinafter referred to as “the petitioner company” or “the Transferor Company”) and Torrent Power Limited (TPL) (hereinafter referred to as “the Transferee Company”) as well as the Reorganization of the Share Capital of the Transferee Company since the petitioner being a Public Limited Company within the meaning of Companies Act, 1956.

2. So far as the Company Petition No.68 of 2006 is concerned, it is for the sanction of this

Court to a Scheme of Arrangement including the Amalgamation to be made between Torrent Power SEC Limited (TPSL) (hereinafter referred to as “the petitioner company” or “the Transferor Company”) and Torrent Power Limited (TPL) (hereinafter referred to as “the Transferee Company”) as well as the Reorganization of the Share Capital of the Transferee Company, since the petitioner being a Public Limited Company within the meaning of Companies Act, 1956.

Company Petition No. 69 of 2006 is concerned, it is for the sanction of this Court to a Scheme of Arrangement including the Amalgamation to be made between Torrent Power Generation Limited (TPGL) (hereinafter referred to as “the petitioner company” or “the Transferor Company”) and Torrent Power Limited (TPL) (hereinafter referred to as Transferee Company) as well as the Reorganization of the Share Capital of the

Transferee Company since company being a Public Limited Company within the meaning of Companies Act, 1956.

So far as the Company Petition No.70 of 2006 is concerned, it is for the sanction of a Scheme of Arrangement including the Amalgamation of Torrent Power AEC Limited (TPAL), Torrent Power SEC Limited (TPSL) and Torrent Power Generation Limited (TPGL) (hereinafter referred to as “the Transferor Companies”) with Torrent Power Limited (TPL) (hereinafter referred to as “the petitioner company” or “the Transferee Company”) as well as for the Reorganization of the Share Capital of the petitioner Company, being a Public Limited Company within the meaning of Companies Act, 1956.

Thus, TPAL, TPSL and TPGL are the Transferor Companies and TPL is the Transferee Company. There is consensus

amongst learned advocates appearing for respective parties to hear this case finally today.

3. It is the case of the petitioner Company that on 28th day of May, 1913, the Ahmedabad Electricity Company Limited, under the provisions of Indian Companies Act, VI of 1882 of the Legislative Council of India came to be incorporated. The name of the company was subsequently changed to Torrent Power AEC Limited on 28th October, 2004. As per the Audited Balance Sheet on 31.03.2005, the authorized share capital is Rs.50,000 lacs issued Rs.11,327.58 lacs and Subscribed and Paid-up Share Capital is Rs.6327.44 lacs. The Memorandum and Articles of Association of the petitioner Company is annexed with Annexure-'A' to the petition, which broadly enumerates business of the Company to be carried out and so as to generate, develop

and accumulate electrical power and also to transmit, distribute and supply such power at various places. It also mentions incidental or ancillary object to the attainment of main objects which clearly provided for entering into any arrangement from sharing profits, amalgamation, union of interests, co-operation or otherwise with any person or company engaged in any business etc. It is stated that petitioner Company i.e. Torrent Power AEC Limited (TPAL) and earlier known as Ahmedabad Electricity Company Limited, is 93 year old integrated power generation, transmission and distribution power and the company listed on Bombay Stock Exchange Limited and National Stock Exchange of India Limited, with generating capacity of 500 MW and supplier of 4 billion units of power to around 1.3 million customers. The Company for the financial year 2004-05 has total income of approximately Rs.1335 crores and the net

profit was nearly Rs.106.71 crores and built up reserves of nearly Rs.632 crores.

4. The Transferee Company Torrent Power Limited (TPL) was incorporated as a Private Limited Company on 29th April, 2004, on a change of name it is known after conversion into a Public Limited Company as a Torrent Power Limited. A Fresh Certificate of Incorporation was obtained on 08.02.2006 which is also to undertake consolidated operation of the three Transferor Companies of the Torrent Group in the power sector.

5. The reasons narrated for Scheme of arrangement is with a view to consolidate the power business of the Torrent Group of amalgamating three Companies i.e. TPAL, TPSL and TPGL into TPL and considering the scenario prevailing in the energy sector, it was thought fit that in order to enable the

group to be more competitive and for better growth opportunities so as to capitalize on the strength of these three companies in a systematic, integrated and optimized fashion. The Board of Directors has decided for amalgamation so that twin objectives of sustainability of the existing efficiency parameters and future growth can be achieved. It also narrates strategic, financial, Organizational and Operational advantage so that proposed amalgamation could enable the group to leverage its existing assets and human resources for enhancing the value of its stakeholders. It has also in its mind certain other commercial advantages and better investments opportunities in the power sector in this Country.

6. It is further stated about determination of exchange ratio to be provided in the scheme, to the shareholders of three

transferor companies and it was thought broadly to downsize the resultant equity capital of the amalgamated company to maintain/approve the earning per share and also to maintain reasonable trading float ensuring better price discovery so that stakeholders can have certain benefits and the difference so arising out of proposed reduction is to be transferred to general reserve. That reorganisation of the share capital of the transferee company being consequential it is stated that amalgamation proposed is an integral part of the scheme.

7. The salient features of the Scheme of arrangement, Part-I, annexed at Annexure:-'C' after referring to various definitions mentioned about appointed date as dtd.01st April, 2005 is in Clause 2.2. Clause 2.3 mentions about “Assets” and includes undertakings of each of the transferor

company. It also states about Transfer and vesting of undertaking of the transferor companies to transferee companies from the appointed date. Clause-3 refers to operative date. That Clause-4 of Part-II is for share capital. Part-III is about Amalgamation. So far as legal proceedings are concerned, it is clearly stated in Clause-7 that all suits, actions and proceedings of whatever nature by or against the Transferor Companies pending and/or arising on or before the Effective Date shall not abate, or be discontinued or be in any way prejudicially affected by reason of the transfer of the business of the Transferor Companies pursuant to the scheme as proposed. It is further stated that such legal proceedings if any, to be continued, prosecuted and enforce by or against the Transferee Company as effectually as if the same had been pending and/or arising against the Transferee Company, so if the provisions

and undertaking by the Transferee Company about the legal proceedings.

8. The scheme makes specific provisions in Clause-12 are as under:-

“Clause 12: ISSUE OF SHARES BY THE TRANSFEREE COMPANY AND REORGANISATION OF ITS SHARE CAPITAL:-

Clause-12.1:-The Board of Directors of the Transferor Companies and the Transferee Company appointed M/s. N.M.Raiji & Co., Chartered Accountants as the valuer for determination of fair exchange ratio for issue of shares to the shareholders of the Transferor Companies by the Transferee Company pursuant to the amalgamation of the Transferor Companies with the Transferee Company. A fairness opinion has also been provided by M/s Ernst & Young Private Limited on the valuation done by M/s. N.M.Raiji & Co.

Clause-12.2:- Upon coming into effect of this Scheme and in consideration of the transfer and vesting of the Undertaking of the Transferor Companies in the Transferee Company the Transferee Company shall, subject to the subsequent provisions of the Scheme and without any further application or deed, be required to issue and allot to the equity shareholders of the Transferor Companies whose names appear in the Register of Members of the Transferor Companies as on the Record Date, equity shares of the face value of Rs.10/- each in the Transferee Company, credited as fully paid-up, (hereinafter referred to as the "Exchange Shares"), in the following manner.

(a) 22 (Twenty Two) equity shares of Rs.10/- each fully paid-up of Torrent Power Limited for every 1 (one) equity

shares of Rs.10/- each fully paid-up held in Torrent Power AEC Limited.

(b) 47 (Forty Seven) equity shares of Rs.10/- each fully paid-up of Torrent Power Limited for every 1 (one) equity shares of Rs.10/- each fully paid-up held in Torrent Power SEC Limited.

(c) 1 (One) equity shares of Rs.10/- each fully paid-up of Torrent Power Limited for every 1 (one) equity shares of Rs.10/- each fully paid-up held in Torrent Power Generation Limited.

It is clarified that on the scheme being effective, the shares of TPGL held by TPAL and TPSL shall be cancelled and no shares shall be issued by the Transferee Company against these shares."

Clause:12.3:- Upon the Scheme becoming effective, the issued, subscribed and paid up equity share capital of the Transferee Company shall stand reduced with effect from the Appointed Date, in accordance with Section 100 and all other applicable provisions of the Act, if any, in the manner as provided hereunder:

a) The issued, subscribed and paid up equity share capital of the Transferee Company including the Exchange Shares shall be reduced by reducing the face value and paid up value of the said shares from Rs.10/- each to Rs.2.50/- each. Consequent to such reduction in the value of the shares from Rs.10/- each to Rs.2.50/- each, value of the shareholding of the shareholders of the Transferee Company, including the

allotees of the Exchange Shares, shall be reduced proportionately.

b) Simultaneously, 4 (four) equity shares (including the Exchange Shares), each of Rs.2.50/-shall be consolidated into 1 (One) share of Rs.10/- fully paid up.

c) It is hereby clarified that the amount of Rs.1417.35 Crore by which the share capital of the Transferee Company including the Exchange Shares is reduced in terms of Clause 12.3 (a) of the Scheme, shall not be paid to the shareholders of the Transferee Company but shall be credited to the “General Reserve” account of the Transferee Company.

Clause-12.4:-. In view of Clauses 12.1, 12.2 and 12.3 of the Scheme, upon coming into effect of this Scheme and in

consideration of the transfer and vesting of the Undertaking of the Transferor Companies in the Transferee Company, the Transferee Company shall actually issue and allot to the equity shareholders of the Transferor Companies whose names appear in the Register of Members of the Transferor Companies as on the Record Date, equity shares mentioned hereunder (hereinafter called the “New Equity Shares”) of the face value of Rs.10/- each in the Transferee Company credited as fully paid-up, in the following manner:

a) 5.5 (Five and Half) equity shares of Rs.10/- each fully paid-up of Torrent Power Limited for every 1 (one) equity shares of Rs.10/- each fully paid-up held in Torrent Power AEC Limited.

b) 11.75 (Eleven and Three Fourth) equity shares of Rs.10/- each fully

paid-up Torrent Power Limited for every 1 (one) equity shares of Rs.10/- each fully paid-up held in Torrent Power SEC Limited.

c) 0.25 (One Fourth) equity shares of Rs.10/- each fully paid-up of Torrent Power Limited for every 1 (One) equity shares of Rs.10/- each fully paid-up held in Torrent Power Generation Limited.”

It is clarified that on the scheme being effective, the shares of TPGL held by TPAL and TPSL shall be cancelled and no shares shall be issued by the Transferee Company against these shares.”

Clause:12.5:- The Scheme makes provision that reduction of capital of Transferee Company pursuant to the scheme shall be given effect as an

integral part of the scheme and the consent given to the scheme by the shareholders and creditors of the Transferee Company shall be deemed to be their consent under the provisions of Section 100 and all other applicable provisions of the Act to such reduction of the capital of the Transferee Company and the Transferee Company shall not be required to convene any separate meeting for such purpose. It is also stated that the order of the Hon'ble High Court sanctioning the Scheme shall be deemed to be an Order under Section 102 of the Act.

9. In Clause:-12.6 (a) to (g), it is stated that Transferee Company shall take steps for listing of shares and the listing agreement with the stock exchange where the shares of the Transferor Companies are listed is on

record and it assures listing of these shares on the stock exchange where the agreement exists in accordance with the SEBI (Disclosure and Investor Protection) Guidelines, 2000. New equity shares to be issue to shareholders of Transferor company to rank ***parri passu*** with the existing equity shares of the Transferee Company in respect of dividend, bonus, right shares, voting rights and other corporate benefits. Until the Effective Date, the holders of the equity shares of the Transferor Companies shall continue to enjoy their rights under their Articles of Association, including the right to receive dividend if any, declared in accordance with the Act and the Articles of Association of the Transferor Companies. Clause 13 is pertaining to amendment to memorandum and articles of association of the transferee company.

10. It is also stated that by an order dated 01st May, 2006, the learned Company Judge had directed the petitioner company to convene the separate meetings of equity shareholders, unsecured creditors and secured creditors of the company for considering the scheme and if thought to approve with or without modification and accordingly Chairman of the meetings came to be appointed and report of the Chairman dated 10th June, 2006 is on record at Annexure:-'E' to the petition.

11. With the above backdrop of the facts, the petitioner has submitted the scheme for sanction before this Court so as to bind on all equity shareholders, unsecured creditors and secured creditors of the Petitioner Company and also on the petitioner company.

12. At the outset, three objectors have raised their objections against sanction granted by this Court. Objections filed by

Dr. Arvind Gupta, a shareholder is placed on record so as another objector Shri Pravinsinh Jadeja, also a shareholder and the third objector has also filed his objection in Company Petition No.67 of 2006. All the objectors have common grievances and they have relied on submissions of Shri K.M.Patel, learned advocate appearing on behalf of second objector.

13. As per the objectors, one of the main objections is that being shareholder, he has challenged the Government Resolution dated 16.07.1997, whereby a sale transaction and ownership of 28.89% of equity shares in the Torrent Power AEC limited is questioned. According to him, the above Special Civil Application No.8936 of 1998 is admitted by this Court and is pending for final hearing. The second objection is with regard to the outcome of the scheme if sanctioned would

result into erosion of share capital of the shareholders since reduction in the face value of the shares would effectively result in the issue of new shares and the offer made in the scheme is illusive and amounts an eyewash.

14. The third objection is raised to the effect that that public institution like Government of Gujarat, Gujarat State Investments Ltd., Life Insurance Corporation of India Limited, The Oriental Insurance Company Limited, National Insurance Company Limited, General Insurance Corporation of India Ltd. have acted contrary to the public interest and failed to protect interest of different class of investors and tax-payers for the country. According to the objector if the scheme is unfair, unreasonable and detrimental to the shareholders, the Court can certainly judiciously x-ray the scheme by

lifting the veil and reject the same. It is the fourth objection that determination of exchange ratio is not recommended by the firm of Chartered Accountant. According to the objector, evaluation of the shares by two different experts i.e. M/s.N.M.Raiji and Company and M/s. C.C.Choksi and Company, firms of the Chartered Accountant, there is price difference between two valuations within the very short span and the difference is Rs.107 per share since on March 10th, 2006 shares of Torrent Power AEC Limited (TPAL) was evaluated at Rs.327/- as per M/s.C.C.Choksi & Co. and later on in the scheme, the value of the same share is shown as Rs.220/- on March, 22, 2006 as per M/s.N.M.Raiji & Co. which is contrary to the interest of the public at large. The fifth objection is raised that the mandatory provisions of Sections 101 and 102 of the Companies Act, 1956 have been by-passed and

reduction in share capital need not be permitted. The sixth objection is raised by relying on the explanatory statement that sufficient material is not disclosed about status of Transferee Company and sanctioning of scheme would ultimately create monopoly at the hand of the directors who will be exclusively in a control of the affairs of the Transferee Company, which is at a nascent stage and having equity of Rs.5 lakhs and virtually controlled by the directors. Lastly accumulation of free reserve by Rs.1417.35 Crores, will be at disposal of the Directors of the Transferee Company will create monopoly and thus it will be against public interest.

15. Objections raised by the second and third objectors are of the similar nature and need not require reproduction. Shri Sunil Mehta, learned advocate has adopted submissions of

learned advocate Shri K.M.Patel appearing for another objectors.

16. It is also to be noted that the objections placed on record are denied by the petitioner company by filing affidavit-in-rejoinder and it is stated that the shareholders representing around 85% of the total value of shares, attended the meeting and 97.12% in number and 99.999 % in value agreed to the scheme. Thus, the scheme was approved 97.12% in number and 99.999% in value by members present and voting by overwhelming majority of the shareholders in number and in value of shares. It is also stated that voting of Government of Gujarat and its industrial investment agency and other financial institution is in accordance with law. It is further stated that Special Civil Application filed by objector is admitted and the issue being subjudice

further comments were not offered except denial of certain allegations leveled by the objector. By and large the rejoinder reflects incorrect understanding of the objectors about the exchange ratio, wrong comparison of market and book value of the shares of Transferor Company and Transferee Company as wrongly understood by the objector. The provision of general reserved fund, reduction of shares, valuation by the expert in the field are elaborately dealt with in this and another rejoinder filed by the transferor company.

17. Shri S.N.Soparkar, learned Senior Counsel appearing for the petitioner has broadly referred to the background of the Transferor Companies, activities carried out, financial structuring, business transactions, provisions of newly enacted Electricity Act, 2003 and Gujarat Electricity Industry

(Reorganisation and Reg.) Act, 2003, ingredients of Sections 391 to 394 of the Companies Act, 1956 earlier orders passed by this Court ordering convening of the meetings by publishing same in widely circulated two daily news papers i.e. Times of India and Gujarat Samachar, and, thereafter, he has also drawn my attention to the broad features of the Scheme and rationale behind the arrangement of share capital.

18. According to his submission, at the outset, notice of meeting with Explanatory statement under Section 393 of Companies Act, 1956, was sent with all requisite informations and record was kept for inspection at the Registered Office of the companies. Out of 249 equity shareholders who has attended the meeting either personally or by proxy, two shareholders holding 78 shares abstained from voting and 4 ballots entitled

to 127 shares were found invalid. Out of 243 valid ballots cast representing Rs.53,52,23,730/- being 5,35,22,373 shares of Rs.10/ each, 236 votes were found to be in favour of the proposed scheme of arrangement whereas 7 ballots representing Rs.4,010/- were found against the proposed scheme. Thus, resolution came to be passed approving the scheme was carried out by requisite statutory majority of 97.12% in number and 99.999% in value and it was resolved accordingly. Even in the meeting of un-secured creditors which was attended by 32 and the total value of their debts was Rs.41,38,15,141.38 had given their consent. They were thus 100% in number and 100% in value. The meeting of the secured creditors of the company was attended by the sole creditor which valued at Rs.91,84,21,052/- and accordingly it was resolved. He has further submitted that the meeting was convened in accordance with the

statutory requirement under the Act and the Rules and the report is submitted by the Chairman is annexed and affidavit in reply is also filed by the Chairman. According to him, except the objections of objectors of present proceedings, no other person have raised any objection to the approval of the scheme.

19. He has drawn my attention to the report of the Official Liquidator who has submitted report on the basis of the recommendations of the Chartered Accountant appointed from the penal maintained by him which reveals that they have no objection to the scheme. Even report of the Regional Director, Western Region, Ministry of Company Affairs, Government of India dated 03rd July, 2006 is placed alongwith affidavit which indicates furnishing of latest balance-sheet as on 31.03.2005 for the latest financial position and to increase authorized capital of the

Transferee Company by complying Section 94/97 of the Companies Act, 1956.

20. According to Shri Soparkar, learned Senior Counsel appearing for the company, latest financial position of the company as required is placed on record and about second objection he has submitted that in view of the resolution passed increasing in the share capital is integral part of the scheme and the provisions made therein and in view of certain judgments no further procedure is required to be followed. Shri Soparkar, learned Senior Counsel has submitted that on the scheme becoming effective, as mentioned in Clause-13, the authorized capital clause of the Memorandum of Association of the Transferee Company shall be substituted by the paragraph and the approval contained in the said clause and approval by the shareholders to the scheme shall be deemed to

be their consent to the alteration of the Memorandum of Association pursuant to Section 16 read with Section 94 and other applicable provisions. So according to him, there is no need to undertake any further exercise as stated in the above report of Regional Director. Shri Soparkar, learned Senior Counsel has submitted that voting by the representatives of Government of Gujarat Industrial Investment Agency or any other Financial Institution in favour of the scheme, is not contrary to any existing provisions of any law much less under the Companies Act, 1956 or Rules made thereunder.

21. He has further submitted that role of the Company Court while exercising jurisdiction in the scheme of arrangement or amalgamation of the companies, is very limited. According to him, when overwhelming majority of the shareholders have collectively exercised

their commercial wisdom in favour of the scheme and in the present case, it is 97.12% of the value of the shares and the 99.999% in favour of the number and 100% in the case of unsecured creditors and secured creditors qua debts, the scheme as framed provides fair exchange ratio as determined by the experts in the field and vetted by reputed International Firm, requires sanction by this Court.

22. Shri Soparkar, learned Senior Counsel has further submitted that there is nothing to indicate that the scheme is either unfair, manifestly unjust or can be said to be fraud on minority of shareholder or in any case, even detrimental to their interest or public at large. According to him, the objections of the objector, are based on incorrect appreciation of mode suggested for exchange of shares. He has relied on the decision of

the Apex Court reported in **1996 87 Company Cases** and submitted that none of the nine celebrated principles as enumerated by the Apex Court come to the rescue of the objector. Even if the present scheme, according to him, is examined by keeping in mind the above broad principles, the scheme successfully satisfies the test laid down by the Apex Court. The above ratio, according to him, is based after the factors and methods recognized for determination of such ratio as taken into consideration by the Chartered Accountants and it is also in consonance with the reported decision in **1995 Supp (1) Supreme Court Cases 499** in case of **Hindustan Lever Employees' Union** Vs. **Hindustan Lever Ltd. And Others,** where the Apex Court has considered the above aspects in detail.

That there are three other decisions, in the line which followed the above decision by the learned Single Judge of our High Court

also.

23. Shri Soparkar, learned Senior Counsel appearing for the petitioner has referred to the explanatory statement. " 12.1, 12.2., 12.3 and 12.5" and in detail explained why procedure under Sections 100, 101 and 102 of the Companies Act, 1956 need not be followed. In support of above submissions, he has placed reliance on **40 Company Cases Page-871** in the case of **Maneckchowk And Ahmedabad Manufacturing Co. Ltd.** and other two decisions. He has also drawn attention of the Court about valuation of the share of Torrent Power AEC Limited by M/s. N.M.Raiji & Co. Chartered Accountant and M/s. C.C.Choksi and Co. which reveal difference of about Rs.107/- in a short span of 10 days. He has relied on the letters issued by M/s.Raiji & Co. and submitted that both the evaluation was in different context and the evaluation of this

scheme is concerned, it was as per the regulation framed by SEBI.

24. So far as General Reserve and the fund to be utilized, he has submitted that said reserve is created with specific purpose since it can be used only as per the provision of the Companies Act, 1956 and mainly with regard to the issuance of dividend and making provision about loss and likewise. He has also relied upon various clauses of the scheme and submitted that objectors have simply said about scheme being unfair and unjust, but could not point out specifically basis for being branded the scheme as unjust and unfair. He has also relied upon various observations of the Apex Court about power of this Court by re-reading the judgment of the Apex Court in case of **Meehir H.Mafatlal Vs.Mafatlal Industries Ltd. reported in (1996) 87 Company Cases 792** and

submitted that role of the Court is like that of umpire in the game of cricket and unless the scheme is manifestly unjust no interference of the Court is called upon.

25. Shri K.M.Patel, learned advocate appearing for the objectors has submitted that even as per the decision of the Apex Court in case of **Miheer Mafatlal**, the scheme has to be just, fair and reasonable. According to the learned advocate for the objectors, it is not always that once a statutory majority recommends approval of the scheme for arrangement and/or of the scheme for an arrangement and/or amalgamation, the Court would sanction it mechanically. The duty of the Court is to judiciously x-ray the scheme and not to act merely as a rubber stamp. In the present case, initially when 28.89% of equity shares owned by the Government of Gujarat and the sale

transaction with Torrent Power AEC Limited came to be challenged, any approval by such shareholders is not in the public interest and validity and legality of the above transaction is subject matter of Special Civil Application No.8936 of 1988. In advancing further arguments, the learned advocate has submitted that the scheme at Annexure:-'C' is floated with a view to frustrate the outcome of the Special Civil Application and any sanction by this Court would result into a situation of no return.

26. Learned advocate for the objectors has further submitted that determination of share exchange ratio is unfair and it will rob the shareholders of their financial worth as against the listed price of the share of the two listed companies. He has further submitted that the fixation of above ratio is detrimental to minority shareholders and

there are other procedural irregularities also. According to him, even reduction in share capital is not as such an integral part of the scheme and initially even the valuer appointed by Transferor Company did not recommend any reduction of the face value of equity shares from Rs.10/- each to Rs.2.50 immediately upon the approval of the scheme of arrangement. According to the learned counsel for the objectors, effective actual ratio will result into financial losses to small shareholders of two public listed companies i.e. TPAL and TPSL. According to him, even creation of general reserve of Rs.1417.35 crores will be in the hand of the directors of Transferee company, which will create irreversible situation. According to learned counsel for the objectors, the State Government has recently on 10.03.2006 offered another 4.74% of the share holding to Torrent Power Pvt. Limited valued at over Rs.327/-

where the valuation was done by another Chartered Accountant M/s. C.C.Choksi & Company, while in the present scheme the valuation of the share M/s. N.M.Raiji & Co.is Rs.220/-, within short span of 10 days only, which grossly undervalues the equity of the Transferor Company and causes loss to Government of Gujarat.

27. Shri K.M.Patel, learned advocate has further drawn my attention to the provisions of Sections 101, 102 and 173 of the Companies Act, 1956, and Rule 85 of the Company Court Rules, 1959 and submitted that the Transferee Company is having very small base of equity and merger of three Transferor Companies would result into unjust growth of wealth in the hands of Board of Directors at the cost of small shareholders. According to the learned advocate Shri Patel, the Transferee Company is even not doing any business and

amalgamation of transferor company would result into monopoly in the hand of management and fund will be misused.

28. Shri K.M.Patel, learned advocate has relied on mandatory requirement of Section 173 of the Companies Act, 1956 which is not followed in this case and relied on and submitted that the reduction in share capital is not permissible. He has also submitted that power company, catering the need of more than 20% of population in the city and having vast consumer base, cannot be permitted go ahead with the scheme in the public interest.

29. Shri Saurabh Soparkar, learned Senior Counsel in his rejoinder reiterated that in the pending Special Civil Application, no injunction whatsoever is granted against the company in exercising the voting rights by the shareholders. It is submitted that

Section 391 of the Companies Act, 1956 is complete code by itself. According to him, the objections about creation of monopoly is without any factual foundation, since various provisions of the Electricity Act, 2003 and the Electricity Regulatory Commission Act, 1998 would take care of different situations with regard to Transmission, Distribution, and Supply of the Electricity by the transferee company in respect of subject matter of above statutes.

About objection that on effective valuation upon reduction in the face value, equity shareholder of TPAL will get shares worth Rs.55/- only and a person holding a share of TPL would get Rs.5.5 shares only, it is submitted that this objection conveniently ignores the fact that book value of the share of TPAL is only Rs.10/-. If the value of shares of two companies is compared, it becomes clear that against one share of

Rs.10/- of TPAL, the shareholder is getting 5.5 shares worth Rs.10/- of TPL, which means against Rs.10/ the shareholder is getting Rs.55/-. He has further submitted that the fallacy of the objection raised by the objector is because the aspect is not considered from the above angle and he is comparing the market value of shares of TPAL against the book value of shares of TPL. Thus, by comparing un-comparable the objection about eroisen in the wealth of the shareholder is raised artificially.

30. Mr.Soparkar has therefore submitted that the share exchange ratio determined is based on the well considered principles determined by the experts in the field and in consonance with the principles laid down in case of **Hindustan Lever Employees' Union reported in 1995 Supp (1) SCC 499** and for this purpose he referred to the explanatory notes and

relevant clauses therein and submitted that the scheme is unless manifestly unjust and unfair the Court will refuse to lift the veil of the scheme.

31. Shri Soparkar, learned Senior Counsel has further submitted that the dispute which is sought to be raised by the objector is between two shareholders and the same cannot be a subject matter of Section 391 of the Companies Act, 1956 and for this purpose he has relied upon **121 Company Cases 519 in case of National Organic Chemical Vs. Miheer H. Mafatlal.** According to him, voting by the Government, its investment agency and other financial institution cannot be said to be contrary to any statutory provisions or against the public policy. To strengthen his argument, reliance was placed in the reported decision of the Apex Court in **AIR 1986 Supreme Court P-1370 in case of L.I.C. Vs**

Escort Ltd. and more particularly Paras:100 and 102 of the above judgment, where in a similar situation, voting by Life Insurance Company in that case, was approved by the Supreme Court.

Shri Soparkar, learned Senior Counsel has also relied upon the order dated 20th June, 2000 passed this Court (Coram:Hon'ble Mr.Justice K.M.Mehta, J.) in Company Petition No.116 of 2000 connected with Company Application No.166 of 2000. Even according to Shri Soparkar, learned Senior Counsel character and nature of the Transferee Company, existing share capital of the Transferee Company has nothing to do with the scheme of amalgamation so far as Transferor Company, irrespective of its financial and economical strength seek merger of the amalgamation or any arrangement approved by the statutory majority. In respect of his argument, he has relied upon

decision reported in **107 Company Cases 232** and submitted that in a given case, even if a Transferor Company is incurring loss, exercise of power under Section 391 cannot be refused on that ground. Learned Counsel Shri Soparkar again referred to Clause-12.6(c) of the Scheme with regard to listing of new shares.

32. Shri Soparkar learned counsel has, at the cost of repetition, relied on his submissions which he made while describing broad features of the scheme that why the scheme is bona-fide, just and fair and not to the detrimental to the shareholders relying upon the case of **Maneckchowk And Ahmedabad Manufacturing Co.Ltd. (Supra)** and submitted that when the reduction of share capital will be an integral part of the scheme to follow the provisions would amount unnecessary exercise of procedure by the Company for no

earthy reasons. According to him, when the resolutions have been passed by the companies, the Court may not ask the Company to go through the gamut of similar procedure. He has, for this purpose, again referred to the notice of meeting and the explanatory statement and relevant clauses and submitted that all relevant and material facts were placed before the shareholders for their consideration. Not only, that, but, documents were kept for inspection at the registered office of the Transferor Company.

33. Mr.Soparkar, learned Senior Advocate has submitted that O.J.Appeal No.60 of 2006 filed in Company Application 219 of 2006 by the objectors challenging the order passed by the Learned Single Judge directing the Transferor Companies to convene the meeting came tobe disposed of as not pressed with certain clarifications.

34. The Appellate Bench, however, clarified that disposal of appeal would not affect the rights and contentions of the appellants in Special Civil Application No.8936 of 1998 and Company Petition No.67 of 2006 to 70 of 2006. It is also submitted that Civil Application No.6482 of 2006 filed in Special Civil Application 8936 of 1998 is also withdrawn, which indicate, according to learned Senior Counsel appearing for the company, that the request of the objector to stay the relevant proceedings cannot be exceeded.

35. Shri Soparkar, learned Senior Counsel has submitted that by an order dated 01.05.2006 passed in Company Application No.222 of 2006 in Para:10 of the above order, it was considered and thought fit by the learned Company Judge that reorganization of capital is proposed as an integral part of

the scheme of arrangement. It is not necessary to pass a separate resolution for the said reduction. Moreover, the proposed reduction is not in favour of either of liability in respect of unpaid share capital or payment to any shareholder of any paid-up share capital, the procedure prescribed under Section 101(2) shall not apply and hence, the procedure prescribed under Rules 48 to 65 of the Companies Court Rules, 1959 came to be dispensed with. Since, the above order is final so far as the proceedings of these petitions are concerned, no plea, claim now can be raised and meetings convened as per the above order and notice issued accordingly, and resolution passed to that effect, clearly indicates that the scheme of reduction of share capital being integral part of the scheme does not require following the above statutory provisions.

In respect of his arguments, reliance was

placed in a reported decision in case of **Manekchowk And Ahmedabad Manufacturing Co.Ltd. (Supra).** It was submitted that when the share capital is not reduced by extinguishing or reducing liability of any of the shares of the company, in respect of the capital not paid-up or by paying off any paid-up share capital which is in excess of the wants of the company, it is not mandatory to follow the procedure prescribed under sub-section 2 of Section 101 of the Companies Act, 1956, unless the Court so directs. Shri Soparkar, learned Senior Counsel further referred to Clause-15 of Explanatory Statement and Clause 12.5 of the Scheme.

36. Shri Soparkar has placed reliance on **130 Company Cases 123 (Gujarat) in case of Essar Steel Ltd.** ***In.Re.*** and submitted that principles and broad conclusions laid down by the Apex Court in case of **Miheer Mafatlal**

(Supra) can be equally applicable in case of a scheme which requires reduction in share capital. According to him, once the broad parameters as enumerated by the Apex Court are fulfilled, the other requirements of procedural in nature need not detain the Court for according sanction to the scheme recommended by the overwhelming majority. He has further emphasized that even in a view of the Court or according to the opinion of the Court, a better scheme could have been framed or can be recommended, is not a ground for not according sanction to the scheme. He has further submitted that Court would not like to seat in appeal over the collective and commercial wisdom of the shareholders who approved the scheme with open eyes.

37. Reliance was also placed on the decision reported in **107 Company Cases 232 in case of Kirtibhai Hiralal Patel And Ors. Vs.Arvind**

Intex Ltd. and it was submitted that if the shareholders think it proper and think it advantageous to adopt a particular scheme, the Court should not sit in appeal over the decision of the shareholders, since normally it is presumed that shareholders know their interest better.

38. The learned Counsel Shri Soparkar has further relied upon **117 Company Cases 758** and submitted that the principles laid down **Miheer Mafatlal's case (Supra)** are reiterated and followed.

39. So far as pendency of Special Civil Application No.8936 of 1998 is concerned challenging the Government Resolution dtd.16.07.1997, by which sale transaction and ownership of 28.89% of equity shares in the Torrent Power AEC Limited is challenged, it is submitted by the learned advocate

appearing for the petitioner that the same is admitted and it is subjudice and even Clause-7 of the scheme provides for continuation of legal proceedings initiated by or against the Transferor Company even after amalgamation of such company with Transferee Company.

40. That so far as the judgment relied upon by the learned counsel appearing for the objector is concerned, it is submitted that in the present case, reduction does not involve any diminution in the liability to pay or does not involve any repayment of the paid up share capital and the same is specifically excluded by the order dated 01.05.2006 passed in Company Application No.222 of 2006 and therefore, the same is not applicable in the present case.

Thus, in view of the above submissions, learned Counsel Shri S.N.Soparkar has submitted that the prayer as

mentioned in the Company Petition be granted and minutes under Section 103(2) for reduction of capital as referred in Company Petition No.70 of 2006 may also be kindly sanctioned and permit the petitioner to file common order as prescribed under Form No.42 required to be filed with the order under Section 394 of the Companies Act, 1956, for all the three transferor companies and registry be directed to accept such common order.

41. I have heard Shri Saurabh Soparkar, learned Senior Counsel appearing with Mrs. Swati Soparkar for the Transferee Companies, Shri K.M.Patel, learned advocate appearing for objector no.2 Pravinsinh Jadeja and Dr.Arvind Gupta, objector no.1, party-in-person and also Mr.Sunit Shah, learned advocate appearing for objector no.3 in Company Petition No.69 of 2007.

42. Amidst the torrential, electrifying and energetic submissions of the counsel for the parties, it is profitable, at this stage, to refer to various case-law on the subject matter, as reflected from the pronouncement of this Court and also by the Apex Court. It is held in the case of **Sidhpur Mills Co.Ltd., In re, AIR 1962 Guj 305**, wherein the Court has observed as under:

> “..... it is not for the court to scrutinise the scheme in the manner of 'a carping critic, a hair-splitting expert, a meticulous accountant or a fastidious counsel' for the effort is not to emphasise the loopholes, technical mistakes and the accounting errors. The perspective has to be that of the ordinary shareholder exercising his discretion in a reasonable and businesslike manner. Fundamentally, the point to be emphasized is that the discretion as to whether to sanction the scheme for amalgamation is one which the court has the jurisdiction to exercise.

> This cannot be concluded on the supposed consideration that the scheme has the support of a large majority of shareholders. Majorities are not necessarily comprised individuals each of whom critiques the provision of the scheme with a measure of expertise. Lethargy is not unknown to collective bodies of shareholders and creditors. In these circumstances, the court has to be alive to the duty which sections 391, 392 and 394 cast upon it, before, the court grants the seal of its approval upon the proposed amalgamation."

43. It would be useful to refer to the observations found in the off-quoted passage in Buckley on the Companies Act, 14th edition. They are as under: [Re:page 815, in Miheer H. Mafatlal (supra)]

> " In exercising its power of sanction the court will see, first that the provisions of the statute have been complied with, second, that the class was fairly represented by those who

attended the meeting and that the statutory majority are acting bonafide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honestman, a member of the class concerned and acting in respect of his interest, might reasonably approve.

The Court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interest of the class which it is empowered to bind, or some blot is

found in the scheme."

44. The Supreme Court, in Miheer H. Mafatlal (supra), has dealt with the scope and ambit of the jurisdiction of the company court and broad contours of such jurisdiction, as laid down by the Apex Court, are as under:

(1)The sanctioning court has to see to it that all the requisite statutory procedure for supporting such a scheme has been complied with and that the requisite meetings as contemplated by section 391(1)(a) have been held.

(2)That the scheme put up for sanction of the Court is backed up by the requisite majority vote as required by section 391(2).

(3)That the concerned meetings of the creditors or members or any class of them had the relevant material to enable the voters to arrive at an informed decision for approving the scheme in question.

That the majority decision of the concerned class of voters is just and fair to the class as a whole so as to legitimately bind even the dissenting members of that class.

(4)That all necessary material indicated by section 393(1)(a) is placed before the voters at the concerned meetings as contemplated by section 391(1).

(5)That all the requisite material contemplated by the proviso to sub-section (2) of section 391 of the Act is placed before the Court by the concerned applicant seeking sanction for such a scheme and the court gets satisfied about the same.

(6)That the proposed scheme of compromise and arrangement is not found to be violative of any provision of law and is not contrary to public policy. For ascertaining the real purpose

underlying the scheme with a view to be satisfied on this aspect, the court, if necessary, can pierce the veil of apparent corporate purpose underlying the scheme and can judiciously x-ray the same.

(7)That the company court has also to satisfy itself that members or class of members or creditors or class of creditors, as the case may be, were acting bonafide and in good faith and were not coercing the minority in order to promote any interest adverse to that of the latter comprising the same class whom they purported to represent.

(8)That the scheme as a whole is also found to be just, fair and reasonable from the point of view of prudent men of business taking a commercial decision beneficial to the class represented by them for whom the scheme is meant.

(9)Once the aforesaid broad parameters about the requirements of a scheme for getting sanction of the court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme even if in the view of the court there could be a better scheme for the company and its members or creditors for whom the scheme is framed. The court cannot refuse to sanction such a scheme on that ground as it would otherwise amount to the court exercising appellate jurisdiction over the scheme rather than its supervisory jurisdiction."

45. It is required to be noted that valuation of shares is a technical and complex problem which can be appropriately left to the consideration of experts in the field of accountancy. As observed by the Supreme

Court, in Miheer H. Mafatlal (supra), the following four factors, which had to be kept in mind in the valuation of shares:

1. Capital cover,
2. Yield,
3. Earning capacity and
4. Marketability.

For arriving at the fair value of share, three well known methods are applied:

1. The manageable profit basis method (the earning per share method)
2. The net worth method or break up value method, and
3. The market value method.

46. The Supreme Court, in Hindustan Lever Employees' Union, in paragraph 41 reported in 1995 Supp (1) SCC P-499, observed as under:

"41. This problem of valuation in the case of amalgamation of two companies has been dealt with by Weinberg and Blank in the book Take-overs and Mergers in which it has been stated that some or all of the following factors will have to be taken into account in determining the final share exchange ratio:

1. The Stock Exchange Prices of the shares

of the two companies before the commencement of negotiations or the announcement of the bid.

2. The dividends presently paid on the shares of the two companies. It is often difficult to induce a shareholder, particularly an institution, to agree to a merger or a share-for-share bid of it involves a reduction in his dividend income.
3. The relative growth prospects of the two companies.
4. The cover (ratio of after-tax earning to dividends paid during the year) for the present dividends of the two companies. The fact that the dividend of one company is better covered than that of the other is a factor which will have to be compensated for at least to some extent.
5. In the case of equity shares, the relative gearing of the shares of the two companies. The 'gearing' of an ordinary share is the ratio of borrowings to the equity capital.
6. The values of the net assets of the two companies. Where the transaction is a thorough-going merger, this may be more of a talking-point than a matter of

substance, since what is relevant is the relative values of the two undertakings as going concern.

7. The voting strength in the merged enterprise of the shareholders of the two companies.

8. The past history of the prices of the shares of the two companies.

47. It is also advantageous to refer to a decision reported in **117 Company Cases 758,** where again the Apex Court has reiterated the ratio laid down in case of **Miheer Mafatlal (Supra)** and found that two broad principles underlying a scheme of amalgamation are that the order passed by the court amalgamating the company is based on a compromise or arrangement arrived at between the parties; and that the jurisdiction of the company court while sanctioning the scheme is supervisory only, i.e. to observe that the procedure set out in the Act is met and complied with and that the proposed scheme of

compromise or arrangement is not violative of any provision of law, unconscionable to contrary to public policy. The court is not to exercise the appellate jurisdiction and examine the commercial wisdom of the compromise or arrangement arrived at between the parties. Both these principles indicate that there is no adjudication by the court on the merits as such.

48. So far as such reduction of share capital being an integral part of the scheme, in case of **Maneckchowk And Ahmedabad Manufacturing Co. Ltd.** reported in **1970 Company Cases 871** it is held that " When the capital is reduced by cancelling any paid up share capital which is lost or is otherwise unrepresented by available assets, it is not mandatory to follow the procedure prescribed in sub-section (2) of section 101 unless the court so directs. The procedure prescribed under sub-section (2) of section 101 requires service of the notice of the petition filed for confirming the reduction of capital on every creditor of the company affected by

reduction and who is entitled to object to the reduction. The procedure goes so far as to make provision by order of the court for payment to the dissenting creditors. That procedure is mandatory, where the proposed reduction involves diminution of liability in respect of unpaid share capital or payment to any shareholder of any paid up share capital. That is not the case here."

49. So far as our High Court is concerned, learned Single Judge in **130 Company Cases 129 in case of Essar Steel Ltd.,** ***In Re.,*** has reiterated the principles laid down in **(1996) 87 Company Cases 792** in the case of **Miheer H. Mafatlal** and observed that "once the broad parameters about the requirements of scheme for getting sanction of the Court are found to have been met, the court will have no further jurisdiction to sit in appeal over the commercial wisdom of the majority of the class of persons who with their open eyes have given their approval to the scheme. Even if in the view of the court, there would be a

better scheme for the company and its members or creditors for whom the scheme is framed. The Hon'ble Supreme Court has further observed that the bona fides of the majority acting as a group have to be examined, vis-a-vis, the scheme in question ant not the bona fides of the person whose personal interest might be different from the interests of the voters as a class. The bona fides of a person can only be relevant if it can be established with reasonable certainty that he represents the majority or is the controller of the majority.”

The Court has further observed that “ As far as the variation of the rights of the equity shareholders and violation of the provisions of sections 106 and 107 of the Companies Act, 1956, are concerned, the court is of the view that there is no variation of rights as such and there is no violation of the provisions contained in sections 106 and

107 of the Act. As a matter of fact, these provisions have no application to the facts of the present case. The variation referred to in section 106 is variation to the prejudice of any class of shareholders, and not any variation involves the curtailment of the rights of any class or classes of shareholders, the consent or sanction of such class or classes will be necessary."

The Division Bench of our High Court in case of **Kiritbhai Hiralal Patel Vs. Arvind Intex Ltd. (Guj.)** reported in **2001 Vol.107 Company Cases P.232 and particularly at P.239 in placitum B, C and D**, has observed as under:

> " The submission of the learned advocate for the appellants that the profit making transferor-companies have been amalgamated into a loss making transferee-company is also not well founded. It is true that the company into which the three transferor-companies have merged into is not a well established and profit making company. It

has been submitted by the learned advocate Shri Soparkar that the transferee-company is only a shell company into which the three transferor-companies have merged. The said merger or amalgamation has taken place for some synergic advantages. Looking to the hugeness of capital of the transferor and the transferee companies, a nominal loss of approx. Rs. 5 or 10 lakhs by the transferee-company is almost negligible. Once again we reiterate that it is always for the shareholders to decide whether they should accept a particular scheme. If the shareholders think it proper and think it advantageous to adopt a particular scheme, in our opinion, this court should not sit in appeal over the decision of the shareholders."

50. In the backdrop of above position of law with regard to provisions of Sections 100, 101 and 391 to 394 of the Companies Act, 1956 and the rules made therein, the facts of the present case are to be examined, whether the scheme at Exh.'C' is in consonance with requirements of Sections 100, 101 and 391 to

394 of the Companies Act, 1956 or not? That the object and the rationale behind the scheme framed and subsequently approved by class of equity shareholders, unsecured creditors and secured creditors by passing various resolutions are extensively dealt with in earlier paragraphs. That the nature and status of Transferor companies and the Transferee Company, the type of commercial venture, are referred to. That salient features of the scheme are reproduced in Paras:7, 8 and 9 of this judgment and compliance of various provisions as required under the Companies Act, 1956 and rules made therein. That upon seeking order for convening meetings of the shareholders, unsecured creditors and secured creditors, this Court had passed an order on 01.05.2006 in various Company Application Nos.119 of 2006, 120 of 2006, 121 of 2006 and 122 of 2006 and it was effectively published in two

daily newspapers i.e. “Times of India” and “Gujarat Samachar” of Ahmedabad Editions. Thereafter, the date of hearing of the petition for according sanction to the scheme was also advertised and as per provisions of Section 393 of the Act notices with explanatory statement were sent, which contained relevant and important features of the scheme as required under law and record of the companies was kept open for perusal of the stakeholders. The report of the Chairman was received alongwith affidavit about events took place in the meetings held as per the order passed by the Court and compliance of various provisions of the Companies Act and Rules as required. That report of the Chartered Accountant appointed by the Official Liquidator is also placed on record, which reveals no objection, if the scheme is sanctioned by this Court and also a letter of Regional Director, Western Region, Ministry

of Company Affairs, Government of India dtd.03rd July 2006 with affidavit filed by the Deputy Registrar of Companies, Ahmedabad dtd.04th July, 2006 with certain points to be urged at the time of hearing.

51. The foremost requirement, before sanctioning the scheme under the provisions of Sections 391 to 394 of the Companies Act, 1956, is to comply with the provisions of the above sections and various rules and analogous provisions in this regard. In the above context, if the present scheme at Exh.'C' is scrutinized including amalgamation to be made between the Transferor Companies and Transferee Company as well as re-organization of the share capital of the Transferee Company, there are three Transferor Companies i.e. TPAL, TPSL and TPGL and TPL is the Transferee Company.

52. Sub-sections (1) and (2) of Section 391 of the Companies Act, 1956 are as under:-

“391. Power to compromise or make arrangements with creditors and members.

(1) Where a compromise or arrangement is proposed-

(a) between a company and its creditors or any class of them; or

(b) between a company and its members or any class of them;

the Court may, on the application of the company or of any creditor or member of the company, or in the case of a company which is being wound-up, of the liquidator, order a meeting of the creditors or class of creditors, or of the members or class of members, as the case may be, to be called, held and conducted in such manner as the Court directs

(2)If a majority in number representing three-

fourths in value of the creditors, or class of creditors, or members, or class of members as the case may be, present and voting either in person or, where proxies are allowed [under the rules made under Section 643], by proxy, at the meeting, agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the Court, be binding on all the creditors, all the creditors of the class, all the members, or all the members of the class, as the case may be, and also on the company, or, in the case of a company which is being wound-up, on the liquidator and contributories of the company:

[Provided that no order sanctioning any compromise or arrangement shall be made by the Court unless the Court is satisfied that the company or any other person by whom an application has been made under sub-section (1) has disclosed to the court, by affidavit

or otherwise, all material facts relating to the company, such as the latest financial position of the company, the latest auditor's report on the accounts of the company, the pendency of any investigation proceedings in relation to the company under Sections 235 to 251, and the like]. “

53. Section 393 is with regard to function as to compromises or arrangements with creditors and members which provides that if the meeting is called under Section 391, every notice including the meeting is to be sent to a creditor or a member with the statement stating forth the terms of compromises or arrangements and explaining its effect and the interest of the Directors, Managing Directors or Manager of the Companies with the scheme of compromise, if any. It also interalia provides about other requirements which we are at present not concerned with.

Section 394 is with regard to the provision for facilitating reconstruction and amalgamation of companies which specifically provide under Sub-clause III of Clause-(b) of Sub-section (i) of Section 394 about the continuous by or against the Transferee Company of any legal proceedings pending by or against any Transferor Companies and Section 394(A) is about notice to be given to the Central Government for application under Sections 391 and 394 of the Act. So far as Section 100 of the Act is concerned, it provides for reduction of share capital and special resolution be passed in this regard and Sections 101, 102, 103 and 104 are about the procedure further to be followed in this regard.

54. Thus, in the present case, meeting was convened by the petitioner company as per the direction given by the order dated 01.05.2006

passed in the Company Application. In all the Company Petition Nos.67, 68 and 69 of 2006, it was an order with regard to Transferor Companies while in Company Application No.222 of 2006 order passed on 01.05.2006 is concerned, it was in the case of Transferee Company TPL, where by specific order, requirement of procedure prescribed in Section 101(2) and under Rules 48 to 65 of the Companies Court Rules, 1959, came to be dispensed with.

55. Thus, on perusal of the record, the notice was published in the newspaper as ordered on 01.05.2006 in two daily newspapers i.e. “Times of India” and “Gujarat Samachar”. Accordingly the notices of the meetings were advertised in the “Times of India” English Daily and “Gujarat Samachar” Gujarti daily, both Ahmedabad editions on 10th May, 2006 and also additionally it was published in

"Sandesh" and "Divya Bhaskar", Gujarti daily both Ahmedabad editions on 10th May, 2006 and 11th May, 2006 and meetings were convened on 08th June, 2006 and Chairman has filed report alongwith affidavit dtd.10.06.2006. Thus, the petitioner company has complied with the direction of the order passed on 01st May, 2006 by convening separate meeting of equity shareholders, unsecured creditors and the secured creditors of the companies.

56. As revealed from the report of the Chairman that the scheme at Exh.'C' is approved by 97.12% of the shareholders in numbers and 99.999% of value of shares present and voted in the meeting in the case of equity shareholders. So far as unsecured creditors are concerned, approval was 100% in number and value both, so is the case of secured creditors. These facts are clear and revealed compliance of Sub-section (2) of

Section 391 of the Act which requires majority in number representing ¾th in value of creditor or class of creditor or members present in meeting and voted for the same. Therefore, the objection of the objector to the effect that the scheme is not in consonance with the above requirement of Section 391 is ill-founded. Thus all requirement u/S.391 to 394 of the Companies Act, 1956 are fulfilled and broad parameters of Miheer Mafatlal (Supra) for sanctioning the scheme are satisfied.

57. So far as reduction of share capital as objected, it is clearly established from the fact that since the reduction in share capital was the integral part of the scheme and requirement to be followed under Sub-section (2) of Section 101 of the Act was dispensed with by an order dtd.01.05.2006 in Company Application No.222 of 2006, the above

objection do not survive and need not tobe dealt with. However, even if it is examined in the context of law laid down by this Court in the case of **Maneckchowk And Ahmedabad Manufacturing Co. Ltd. (Supra)** and later on in **130 Company Cases 129 in case of Essar Steel (Supra),** the objections are not well founded. Since the law laid down by the above decision is already reproduced, the same is not repeated. That in the present case, no liability is reduced qua share capital unpaid or payment to Shareholders of any paid up share capital, as per Clause 15 of Explanatory statement and Clause 12.5 of the Scheme. Thus, even stakeholders were informed as required u/S. 173 of the Act.

58. Besides, as per principles laid down by **Miheer Mafatlal's Case (Supra),** the present scheme fulfills all the relevant criteria laid therein and against commercial and

collective wisdom of the class, this Court would not like to seat in appeal over the same.

59. Even objection with regard to determination of share exchange ratio, on scrutiny it is found that the same is recommended by the expert in the field M/s. N.M.Raiji & Co. and rated as fair by giving fair opinion by M/s. Ernst & Young Private Limited, the Internationally recognized firm and company and having applied three methods of determination of the above exchange ratio as reflected from the explanatory statement and Clause-12(a) net assess method, (b) earning capitalization method and (c) market price method and explanation further given in the affidavit in rejoinder filed by the petitioner about misconception on the part of the objector about understanding the scheme and ratio by comparing market value of the

Transferor Company with book value of the Transferee Company the above ratio is not unfair in any manner. The objector has only highlighted so-called reduction in face value but not the fact that once such reduction takes place, four shares are consolidated into one and the same is only an accounting method and to see that share capital remains at manageable level. The clauses of the schemes 12.1, 12.2, 12.3 and 12.4 are indicative of the fact that shareholders of the Transferor Companies are not at loss in any manner. It is to be noted that in the exchange, book value of the share of the Transferor Company is to be compared with the book value of the Transferee Company and in the present case, the book value of the Transferor Company is Rs.10/- and so as of Transferee Company. As per the manner suggested 5.50 equity shares of Rs.10/- each fully paid up of TPL for every one equity

share of Rs.10/- each fully paid up held in Transferor Company TPAL is offered, against book value of Rs.10/-, shareholder of the Transferor Company will get Rs.55/- of Transferee Company. So far as the market value of the share of the Transferee Company to be listed, can be considered after the price of shares of Transferee Company is quoted in the stock exchange. Even if Clause-12.3 is considered about downsizing the value of the share is concerned, it is reflected from (b) of Clause-12, simultaneously four equity shares each of Rs.2.50 shall be consolidated into one share of Rs.10/- fully paid and thus there will be no loss to any shareholders. So is the case of TPSL/TPGL except the statistics.

60. Keeping in mind the ratio laid down by the Apex Court in the case of **Hindustan Lever (Supra)** as relied upon again in **Miheer**

Mafatlal's case (Supra), I do not find that share exchange ratio in any manner unfair and detrimental to the shareholders of the Transferor Companies.

60.1 So far as the creation of general reserve to the tune of Rs.1417.35 Crores is concerned, again the creation of such reserve is not contrary to any provisions of Companies Act and it is to be utilized only after following the provisions of the Companies Act like giving dividends, bogus shares or making good the loss after passing appropriate resolution. Thus, it cannot be said that it will be advantageous to the Directors of the Transferee Company and will create any monopoly. Therefore, there is no merit in the above objections of the objector.

61. The status of Transferee Company being not

listed and the objections raised in this regard do not detain this Court any longer in view of listing agreement by the Transferor Companies with SEBI and provisions made in this regard in the scheme particularly in Clause 12.6 (a), (b) and (c) which provide for issuance and allotment of the shares to the shareholders of the Transferor Companies. Even this Court has held that even if Transferee Company is making loss, the above aspect itself will not preclude the Court from according sanction to the scheme.

That it is worthwhile to note that as per reported decision in **Vol.125 Company Case P.289,** delivered by the learned Single Judge of **Andhra Pradesh High Court in the case of Compact Power Sources P.Ltd., *In re*** and another decision reported in **2006 (69) SEBI and Corporate Laws Report 10(Bombay)** delivered by the learned Single Judge again

has taken a view that in a given case even non-compliance with provision of Clauses-24(f), 24(g) and 24(h) of listing agreement with SEBI does not, by itself, bar the company from seeking sanction of a scheme of amalgamation under Sections 391 to 294 of the Companies Act, 1956, nor does it entail in automatic disposal of such petition.

In the present case, the listing agreement is in existence and not only that the scheme provides the safe-guard in Clause 12.6 (a), (b) and (c) about issuance of allotment of shares to the shareholders of Transferor Company after amalgamation. Therefore, the scheme is just and proper and cannot be said to be unfair or in any manner detrimental to the interest of the shareholders and requires to be sanctioned by this Court.

62. That even objection about voting by financial institutions and State Government agency in favour of scheme cannot be sustained in view of the decision reported in **AIR 1986 SC 1370** where voting by L.I.C. In that case was approved by the Hon'ble Supreme Court as referred in Paras:100 and 102 of the above judgment. That financial institution and Government Corporation are free to exercise their discretion in accordance with law with regard to the investment and disinvestment of the share capital held by them of a company, for which scheme as framed. In an era of liberalisation, privatisation and globalisation the financial institutions are free to exercise their discretion in a fair and just manner and no public or private interest is jeopardised in the present scheme.

63. So far as challenge to the decision of the

State Government by which ownership of 28.89% of equity shares by filing Special Civil Application No.8936 of 1998 is concerned, the same is admitted and the matter being subjudice has no relevance with the present scheme of sanction which do not require any interference. Even Civil Application filed later on is withdrawn by the objector in the aforesaid Special Civil Application. Besides, Clause-7 of the scheme provides for the continuity of the legal proceedings against and by Transferee Company even after the scheme is approved.

64. The objection was raised with regard to different valuation by two firms of Chartered Accountant and within short span of 10 days value of share of TPAL is shown, which indicates difference of Rs.107/-. The above objection does not hold good so far as both the valuation of shareholding of the

company was for different purpose. It is explained by the petitioner that while it was for the purpose of finding out the price, at which the Government of Gujarat was to sell the shares held by it in TPAL to the Torrent Power Group. That two reports are the exercise undertaken by experts for different purposes i.e. M/s. N.M.Raiji & Co. and M/s.Ernst & Young Private Limited have opined on the fairness of exchange of ratio of shares which is always in relative terms while the valuation carried out by M/s.C.C.Choksi and Company is the absolute valuation of shares of TPAL. Thus, the above objection is also of not help to the objector.

65. It is also tobe considered that suggestions made by the Regional Director in his affidavit and the letter dtd.03rd July, 2006 annexed thereto about furnishing latest

balance sheet the same is placed on record and true copy indicates provisional balance sheet as on 31st March, 2005. The above compliance is reflected alongwith additional affidavit dtd.05th July, 2006 filed by Shri Ashok Modi on behalf of TPAL.

That suggestion with regard to increasing authorized capital of Transferee Company and compliance of Section 94/97 of the Companies Act, 1956, is concerned it is on record that resolution is passed increasing the share capital being integral part and provisions made about listing of share capitals, it is not necessary for the company to undergo the same procedure once again. Thus, the company has filled up the lacuna pointed out by the Regional Director.

66. Even the report of the Official Liquidator submitted alongwith the report of the Chartered Accountant pointed out by him also

indicate that the procedure as laid down under the Companies Act, 1956 is followed and there is no objection to the scheme if the same is sanctioned by the Court, since affairs of the companies are not conducted in any manner prejudicial to the stakeholders.

67. That so far as reliance placed by Mr.K.M.Patel, learned advocate appearing for the objectors on the decision reported in **AIR 1998 ORISSA 153** is concerned, the same is not applicable in the facts of the present case, since reduction does not involve any diminution in the liability to pay or it does not involve any repayment of the paid up share capital and specifically by virtue of the order passed in Company Application No.222 of 2006 procedure under Rules 48 to 65 of the Rules and Section 101(2) of the Act was dispensed with and the same is final.

Shri K.M.Patel, learned advocate for the objectors has also relied upon another decision reported in **1949 Indian Law Reports Culcutta Series 127 of Bharati Central Bank Ltd.** which referred to Section 153 of the Indian Companies Act, 1913, which on the contrary helps the petitioners since four criteria laid in the above decision are fulfilled by the petitioners, which are as under:-

(i) that the provisions of the Act have been complied with;

(ii) that the scheme is a reasonable and practical one;

(iii) that the creditors and shareholders had sufficient information with regard to the affairs of the company before approving the scheme and that they acted in good faith;

(iv) that there are no consideration of interest to the public which should overside the decision of the creditors and

shareholders;

68. Thus, if the scheme is scrutinized, keeping in mind the decisions of the Apex Court and this Court as reproduced in Paras:42 to 48, the Scheme as a whole is just, fair, reasonable and bona-fide and in the public interest requires sanctioned in accordance with law, and therefore, the scheme at Annexure-c alongwith the Schedule is sanctioned and shall be binding on all the equity shareholders, unsecured creditors and the secured creditors of the petitioner company and on the petitioner company. All these petitions are allowed with the reliefs mentioned therein. So far as prayer made in Company Petition No.70 of 2006 is concerned, minutes under Section 103 for reduction of capital as mentioned therein is also sanctioned and petitioner is hereby permitted to file common order as prescribed under Form

No.42 requires to be filled in under Section 394 of the Companies Act, 1956 for all the Transferor Companies and the Registry is directed to accept such common order.

69. At this stage Mr.K.M.Patel, learned advocate for the objectors made a request before the Court to stay the operation of the order to which Mr.S.N.Soparkar, learned Senior Counsel has raised an objection. However, I do not find any reason to stay the operation of the order and hence, the prayer made by learned advocate for the objectors is rejected.

70. The fees of the learned Assistant Solicitor General of India is quantified at Rs.3500/-to be paid by the petitioner-company.

amit (ANANT S.DAVE, J.)